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74-365

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

LEVI WHITTED,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA

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JURISDICTION

The jurisdiction of this Court is invoked, the petitioner respectfully submits, under 28 U.S.C. § 1257 (3) and further under the Fourth Amendment to the United States Constitution and Sections 19, 20 and 23, Article 1, Constitution of North Carolina. The Petitioner contends that his right under the aforementioned Constitutional provisions have been suspended without legal justification, and that the Court should assume jurisdiction of this case.

Petition is made to this Court to review the opinion of the Court of Appeals of North Carolina in STATE OF NORTH CAROLINA v LEVI WHITTED 7414 SC 348, and the denial of a petition for Certiorari by the Supreme Court of North Carolina to the Court of Appeals of North Carolina.

The petition to the Supreme Court of North Carolina was made in apt time under the Supplementary Rules of Practice of the Supreme Court of North Carolina (Rule 2). Said petition was denied on July 1, 1974 and certified to the Court of Appeals on the same date.

The petition for certiorari to the Court of Appeals of North Carolina served to exhaust all State remedies before applying to this Court. The Constitutional matters raised here were raised in the Courts below. Jurisdiction of this Court

is thus invoked within the time allowed by Rule 22 of the Revised Rules of the Supreme Court of the United States.

STATEMENT

Defendant-appellant was tried on three separate bills of indictment, charging defendant with felonious possession of Schedule I Controlled Substance Heroin (Rp 2) felonious possession of Schedule I Controlled Substance with Intent to distribute (Rp 3), and manufacture of Schedule I Controlled Substance-Heroin (Rp 4). Defendant was tried during the October 8, 1973, Session of Superior Court held in Durham County, the Honorable Edward B. Clark, presiding.

Upon motion of the District Attorney, the three cases were consolidated for trial. Defendant entered pleas of not guilty to all three counts (Rp 5). The jury returned a verdict of guilty on all three counts, and defendant was sentenced to an active prison term of five (5) years for possession with intent to distribute (Rp 5), five (5) years for possession, (Rp 6) and not less than four (4) nor more than five (5) years for manufacture of heroin. In open court, the defendant gave notices of appeal to the North Carolina Court of Appeals.

During the trial, defendant-appellant properly interposed his Constitutional objections to the introduction of evidence, which he vehemently submits, was the fruit

of a constitutionally impermissible search and seizure. The defendant-appellant's objections were overruled, to which rulings of the court the defendants respectfully excepted.

The case was appealed to the Court of Appeals, which is the North Carolina Court designated to hear all felony criminal appeals, except those of a capital nature, by North Carolina General Statute 7A-27(b). That court reversed the convictions and arrested judgment in the possession with intent to distribute and manufacture of heroin charges. However, the Court of Appeals affirmed the conviction for possession of heroin. Subsequent thereto, and in apt time, petition for Certiorari was made to the Supreme Court of North Carolina by the defendant on the charge of the possession of heroin, which the Court of Appeals had theretofore affirmed. Said petition was denied pro forma on July 1, 1974. Immediately thereafter, the State of North Carolina, through the Attorney General, petitioned the North Carolina Supreme Court for a Writ of Certiorari concerning the possession with intent to distribute and manufacture of heroin charges, which the Court of Appeals had reversed and arrested judgment. Said petition by the State was denied on August 30, 1974.

STATEMENT OF FACTS

On March 6, 1973 at 11:45 a.m., a

warrant was issued to Sgt. J. C. Fuller of the City of Durham Police Department, Vice Division, purporting to command him to search the premises and the person of Larry Lee and Larry Lee's vehicle (addendum to the record) for the controlled substance, heroin. This warrant was issued by Magistrate Jewel Parrish based upon these facts which purport to establish probable cause for the issuance of a search warrant (verbatim)

> "A reliable citizen of the City of Durham, N. C. who has given me information in the past that has led to the arrest and conviction of several people in Durham County Superior Court, dates of conviction being week of 4-24-72, 7-17-72 and 11-20-72, all drug convictions. This informer stated to me on 3-6-73 that on this date he was in the home of Levi Whitted, Rt. 2, Guess Road, Durham, North Carolina in the presence of Larry Lee. At that time he saw within the above address a quantity of heroin in the possession of Larry Lee. This informer has been in the Vice Squad Office on several occasions and has correctly identified heroin and recognizes heroin when he sees it."

After receiving the warrant, Officer Fuller, along with several other officers

from the Vice Division, went to Rt. 2, Guess Road, Durham County, North Carolina, a house which petitioner, Levi Whitted owned, but in which, according to testimony, he did not live and had not lived for several years. Officer McClenny served the search warrant upon Larry Lee (R p23) who was found in a bedroom to the left, just inside the front door. He was in the front bedroom of the house as the officers entered. Officer Fuller went into the bedroom in which he had first seen Lawrence Whitney (Larry Lee), and thoroughly searched. Officer Fuller found marijuana in a night-stand dresser drawer right beside of the bed in the bedroom Larry Lee was occupying. Officer Fuller found Larry Lee's suitcase which contained a large sifter, a card from a deck of cards and a measuring spoon, in the same bedroom area.

The officers then commenced a search of all other rooms and areas of the Whitted home, which revealed no evidence of Larry Lee's presence. Specifically, they went into the attic of petitioners premises, which was not just a regular small attic. The officers had to pull the stairway down and then go up a little hallway at the top of the steps. To the left of the hallway was a room which contained a coffee table in the middle of the floor. In another room in the attic, there was found two large trunks, which were closed. In one trunk was recovered a box of glassine bags, some measuring spoons, a sifter, some rubber bands, some tape, and

a package of white powder which was later analyzed to contain ½ of one percent heroin (R p69).

It was apparent from the evidence that at the time the alleged informer allegedly saw heroin at the home owned by Petitioner, the petitioner was not present in said home, did not know that the said Larry Lee, in whose possession the heroin allegedly was, had come to town to visit in the home owned by him, nor was the Petitioner present in said home when the officers came to serve the search warrant on the said Larry Lee.

ARGUMENT

I

DID THE TRIAL COURT ERR IN FAILING TO INVALIDATE THE SEARCH AS TO PETITIONER AND HIS PREMISES BECAUSE THE SEARCH WARRANT FAILS TO COMMAND OFFICERS TO SEARCH THE PREMISES OF PETITIONER?

The search warrant in this case COMMANDED any lawful official Empowered to Conduct the Search Authorized by this Warrant "to search the premises and the person of Larry Lee and Larry Lee's vehicle" for the property in question. (See Addendum to Record)

The affidavit, attached to the search warrant, and purporting to indicate that Larry Lee was in possession of heroin, makes no mention whatsoever, that Larry Lee was there or ever had been, in possession or control of the premises at Rt. 2, Guess Rd., Durham, N. C. which were in fact searched, and from which the contraband seized. Morrison v State of Texas, 202 S. W. 2d 938 requires that the warrant must allege who is in possession and control of the premises to be searched if said person (s) is known; The warrant and the affidavit both unequivocally recite that the premises searched were those of petitioner Levi Whitted, and fail utterly and completely to even suggest that the premises searched were under the possession and control of anyone other than petitioner. Therefore, it is clear that the lawful officials failed to search where they were COMMANDED, to search, that being the premises of Larry Lee, and that the search of Petitioner's Whitted's premises was unconstitutional for the reason that said search was not authorized on the face of the search warrant.

II

DID THE TRIAL COURT ERR IN FAILING TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO A SEARCH OF PETITIONER'S PREMISES, WHEN THE SEARCH WARRANT IS DIRECTED TOWARD TWO INDIVIDUALS, WITH NO APPARENT CONNECTION, WHEN

THE AFFIDAVIT WHICH PURPORTS TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT, IS LEGALLY SUFFICIENT AS TO ONE INDIVIDUAL, BUT LEGALLY INSUFFICIENT AS TO THE OTHER, THE PETITIONER, IN THIS CASE.

The Court committed prejudicial and reversible error by denying defendant-petitioner's motion to suppress the evidence allegedly seized from the attic of defendant-petitioner's home, by allowing testimony relative to the seizure and, by allowing such evidence to be introduced and received at trial over the timely objection of defendant-petitioner, based upon the contention of the legal insufficiency of the affidavit supporting the issuance of the search warrant as it pertains to petitioner's home. Petitioner relies upon U. S. v Wroblewski 105 F 2d 444, which established the principle that "the scope of the showing of probable cause limits the scope of the search and seizure." The facts which purport to establish probable cause for the issuance of a warrant to search the entire home of petitioner are as follows:

"A reliable citizen of the City of Durham, N. C. who has given to me information in the past that has led to the arrest and conviction of several people in Durham County Superior Court, dates and

convictions being week of 4-24-72, 7-17-72, 11-20-72, all drug convictions. This informer stated to me on 3-6-73 that on this date he was in the home of Levi Whitted, Rt. 2, Guess Rd., Durham, N. C. in the presence of Larry Lee. At that time he saw within the above address a quantity of heroin in the possession of Larry Lee. This informer has been in the Vice Squad Office on several occassions and has correctly identified heroin and recognizes heroin when he sees it."

A careful reading of the aforesaid facts which are the sole facts to be considered in establishing the required "probable cause" for the issuance of the warrant to search the premises of petitioner, undeniably state that the undetermined quantity of heroin allegedly observed by the unidentified informant, and reported to the affiant was in the possession of Larry Lee, and not in the possession of petitioner Levi Whitted. Fed. R. Crim. P. 41(c) states: "A warrant shall issue only an affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant." At least six federal courts of appeals have interpreted the rule to require a "four corners" approach: That all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath. See United States v Anderson 453 F 2d 174 (9th Cir.

1971); United States v Pinkerman, 374 F 2d 988 (4th Cir. 1967) United States v Sterling, 369 F. 2d 799 (3rd Cir. 1966); United States v Freeman, 358 F. 2d 459 (2nd Cir. 1966); Rosencranz v. United States, 356F 2d 310 (1st Cir. 1966); and United States v Whitlow, 339 F. 2d 975 (7th Cir. 1964).

The affidavit does not state that the reliable citizen saw heroin on the premises of Levi Whitted, but only that the reliable citizen saw a quantity of heroin in the possession of Larry Lee; Larry Lee as well as the reliable citizen being on the premises of Levi Whitted at that particular time. Possession of the heroin was laid exclusively in Larry Lee, and there is absolutely nothing in the affidavit that would even tend to suggest that Larry Lee lived in, or in any way manner possessed or controlled the premises at Rt. 2, Guess Road at any time, either on or before the day of 3-6-73.

There is no indication in the affidavit that petitioner Levi Whitted was physically present on or about his premises on the occasion that the heroin was allegedly seen in Larry Lee's possession. The facts which purport to establish probable cause to search petitioner's home fail to even suggest that petitioner knew or had reason to know that Larry Lee was on his premises in possession of heroin, or that Larry Lee

was on his premises at all, or that petitioner knew that there existed a human being named Larry Lee. Following the holding of U. S. Ventresca, 380 U. S. 102, 13L Ed 2d 684, the petitioner assetts that this affidavit, like all other affidavits for a search warrant, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. In Aguilar v Texas 378 U. S. 114, 12L 2nd 729, 84 S. Ct. 1509, the U. S. Supreme Court stated that "Probable cause is in keeping of the magistrate. Yet, anything he says does not necessarily go either. He too is bound by the Constitution.

The affiant told the magistrate that an informer said he was in the presence of Larry Lee and at that time he saw a quantity of heroin in the possession of Larry Lee. The petitioner vigorously asserts that this is the common sense and realistic way to interpret the language of the facts establishing probable cause in the instant affidavit. The affidavit used to support the search warrant as to petitioner's premises in the instant cause is truly unique. No other case has been found in any jurisdiction in which such a minimal recital has been accepted as establishing probable cause for issuance of a search warrant. In all affidavits encountered, there has either been some recital as to the character and/or the

reputation of the premises desired to be searched, and/or the reputation of the person in possession and controlled of the premises for engaging in illicit conduct that is the subject of investigation, or at least a recital that such illicit conduct has occurred on previous occasions. Not so, in the instant affidavit. Here an informer tells the affiant of an apparent "one-shot" occurance of illicit conduct, on the part of one who, for all that appears, is a total stranger to the owner of premises, and of whose presence on the premises at the time the owner is not even aware. Oral analyzing from the instant situation—a parent, whose son or daughter would come home from school for a visit and bring with him on one isolated occasion a classmate who possesses on his person an unlawful drug, who is unknown to the parent and of whose presence in the home the parent is unaware, would be liable to have a search warrant for his home issued, for a search for such unlawful drug, on the basis of such bare recital alone. If the necessary recitals for probable cause are stripped down to such level, it is submitted that the whole concept of search warrant vanishes into thin air, not just for the small percentage of our populace whose hearts are inclined toward evil and law-breaking, but for all of us and we are not far from the police state.

While the affidavit does not support a search warrant to search the premises

of petitioner Whitted, said affidavit does indeed support the issuance of a search warrant for Larry Lee's person, Larry Lee's vehicle and, petitioner submits, the immediate area surrounding Larry Lee, from which Larry Lee might have obtained something that could have been used as evidence against him. In this case, that immediate area would be the bedroom area in which Larry Lee was found when the officers served the search warrant. Petitioner asserts, based on the reasoning of Chimel v California 89 S. Ct. 2034(1969) that the search of petitioner's entire house was unreasonable as extending beyond the person of Larry Lee, and the area from which Larry Lee might have obtained either weapon or something that could have been used as evidence against him. Based upon the facts found in the affidavit, or the lack thereof, presented to the magistrate, the affidavit does not justify a routine search of any and all rooms in which Larry Lee might have obtained either weapon or something that could have been used as evidence against him.

The Chimel case raised basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest. In Chimel, the court held that applying sound Fourth Amendment principles, the search went far beyond petitioner's person and the area from within which he might obtain either a weapon or something that could have been used as evidence against him. Petitioner

asserts that his same reasoning ought be applied in his case even though the search of his home was not incident to an arrest. A general search of any other area of petitioner's other than the bedroom where Larry Lee was, could not produce any evidence against Larry Lee, the person in whose exclusive possession the heroin was seen, but only evidence against petitioner based on the legal fiction of "constructive possession." Constructive possession which is the sole legal theory upon which petitioner was convicted, is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession of such property, but no actual possession. Playa De Flor Land & Imp. Co. v U. S. D. C. Canal Zone, 70 F Supp. 281, State of North Carolina v Baker 56 S.E. 2d 424. "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." State v Harvey 281 N. C. 1, 12, 187.

Petitioner respectfully submits that

since narcotics may be either actually or constructively possessed, and that since only the person under whose control the premises are, may constructively possess narcotics, and since Larry Lee possessed narcotics while on the premises of petitioner Whitted, then the commonsense and realistic interpretation of the facts that establish probable cause compel us to conclude that Larry Lee must have actually physically possessed the narcotics when the informant saw narcotics in the possession of Larry Lee. Therefore, in light of the fact that Larry Lee was in actual physical possession of the narcotics when seen by the informant and in light of the absence of a recital in affidavit, to the effect that the narcotics were ever taken out of Larry Lee's actual possession and placed, even for an instant, into the constructive possession of petitioner, commonsense and fairness reveal no justification for a general search of any area of petitioner's home, except that immediate area within which Larry Lee was found by the officers executing the search.

Obviously, the affidavit reveals that the sole connection between petitioner and the heroin is that the man in actual possession of the heroin (Larry Lee) was on petitioner's premises at the time he was seen in possession of the heroin. As stated in the Harvey case, the law requires that the narcotics must be found on (1)

on the premises and (2) under the control of the accused. State v Harvey (Supra). The informer stated that the Heroin was in the possession of Larry Lee, and petitioner submits that "in the possession of" is legally equivalent to "under the control of" Larry Lee.

The petitioner is not bringing forth this Petition based upon any failure of technical requirements of elaborate specificity once exacted under common law pleading, as disapproved of by Justice Goldberg in U. S. v Ventresca (Supra). Such a failure of technical requirements such as the failure of the affiant in this affidavit to use a gramatically sound and complete sentence ("a reliable citizen of the City of Durham, N. C. who has given me information in the past that has led to the arrest and conviction of several people in Durham County Superior Court, dates of convictions being week of 4-24-72, 7-17-72 and 11-20-72, all drug convictions", is constitutionally excusable. Such a negative and over critical attitude by reviewing courts will tend to discourage police officers from submitting their evidence to a magistrate before acting. Technical imperfections are excusable as to the last sentence in the affidavit-"this informer has been in the Vice Squad Office on several occasions and has correctly identified heroin and recognizes heroin when he sees it." Of course, the court ought take judicial notice of the fact that heroin is a drug of such physical consistency that it looks like countless

other white powders to the eye and requires complicated chemical analysis to identify it as heroin.

What the officers did in this case was to attempt, and succeed, in getting one blanket search warrant, directed toward the person and/or property of two separate individuals, Larry Lee and Petitioner Levi Whitted, based upon an affidavit whose contents were such that if the officers had attempted to get two separate search warrants, one for Larry Lee and one for petitioner, each based upon the same instant affidavit, they surely would have probable cause as to Larry Lee, but fail utterly as to Levi Whitted.

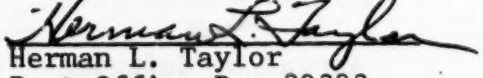
CONCLUSION

The petitioner urgently beseeches this Honorable Court to grant his petition for a writ of certiorari in this cause. He predicates this appeal upon denial to him of a basic Federal Constitutional right. He contends that his claim falls clearly within the proscriptions set forth in cases decided by this Court, alluded to in the arguments herein. While the Petitioner is advertent to the heavy load this Court must bear, he submits that the pronouncements of this Court with respect to the constitutional liberties, in connection with which this Court is the last resort, become a vain and empty thing, unless they are made available

to citizens on an individual, personal basis. Without the intervention of this Honorable Court, effective relief in a situation where the Petitioner contends his Federal Constitutional rights have been grossly abused and abridged, will be forever denied and foreclosed.

The petitioner respectfully prays the Court that his petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX I

NO. 7414SC348 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v. From Durham

LEVI WHITTED

Appeal by defendant from Clark, Judge, 8 October 1973 Session, Superior Court, Durham County. Argued in the Court of Appeals 22 April 1974.

Defendant was charged with felonious possession of heroin, felonious possession of heroin with intent to distribute, and manufacturing heroin. He was convicted on all three counts and appeals from judgment entered on each verdict.

Attorney General Morgan, by Assistant Attorney General Ricks, for the State.

Taylor and Upperman, by Herman L. Taylor, for defendant appellant.

MORRIS, Judge. The record contains six groups of assignments of error based on 39 exceptions. Defendant brings forward and argues only two. Although he does not refer to any exception or assignment of error in his brief, since there are only two questions raised, we choose not to invoke the provisions of Rule 28, Rules of Practice in the Court of Appeals of North Carolina, and dismiss the appeal. Rather, we shall discuss the two questions on their merits.

Defendant first urges that the evidence in this case should have been suppressed on defendant's motion because of the legal insufficiency of the search warrant and the inadequacy of the affidavit upon which the search was authorized.

In United States v. Ventresca, 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965), Mr. Justice Goldberg wrote the opinion for the majority of the Court (Chief Justice Warren and Justice Douglas dissenting). In discussing the requirements of probable cause with respect to search warrants, he said:

> "While a warrant may issue only upon a finding of probable cause, this Court has long held that the term "probable cause...means less than evidence which would justify condemnation," Locke v United States, 7 Cranch 339, 348, 3L ed 364, 367, and that a finding of 'probable cause' may rest upon evidence

which is not legally competent in a criminal trial. Draper v United States, 358 US 307, 311, 3L ed 2d 327, 331, 79 S. Ct. 329. As the Court stated in Brinegar v United States, 338 US 160, 173, 93 L ed 1879, 1889, 69 S Ct 1302, "There is a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them. Thus hearsay may be the basis for issuance of the warrant 'so long as there (9s) a substantial basis for crediting the hearsay.' Jones v United States, supra, 362 US at 272, 4 L ed 2d at 708, 78 ALR 2d 233. And, in Aguilar we recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved whose identity need not be disclosed...was "credible" or his information "reliable." 'Aguilar v Texas, Supra 378 US at 114, 12 L ed 2d ar 729."

With respect to the application of the principles, Mr. Justice Goldberg said:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." Id., 13L. Ed. 2d at 688-689.

In the case before us, the affiant stated under oath before the issuing magistrate that he had probable cause to believe that Levi Whitted and Larry Lee had on the premises of Levi Whitted, the person of Larry Lee and his vehicle, heroin. The affidavit gave the address of the Whitted premises, described the home and Larry Lee and his automobile, giving also its license

number. The affiant stated that the facts given were given by an informant who had in the past given information which had led to the arrest and conviction of people in the Superior Court, Durham County, giving the dates of conviction. Further the affiant stated that the informant had told him that on the date of issue of the warrant he was in the home of Levi Whitted in the presence of Larry Lee and saw within the premises a quantity of heroin in the possession of Larry Lee. Further the informant had been on the Vice Squad office on several occasions and had correctly identified heroin and knew heroin when he saw it.

Applying the principles of Ventresca, we think the affidavit in this case complies with the requirements of the Constitution of the United States, the decisions of the Supreme Court of the United States, the decisions of the Supreme Court of North Carolina, the decisions of this Court, and the statutory law of North Carolina. It was sufficient to constitute the basis for the magistrate's finding of probable cause, and there was no error committed in allowing the evidence in.

Defendant next contends that motion for nonsuit should have been allowed.

As was said in State v Harvey, 281 N. C. 1, 12, 187 S. E. 2d 706 (1972),

"An accused's possession of narcotics

> may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession."

The evidence in the case before us for decision was plenary, if believed, that defendant owned the house, was in and out frequently, that his car was there often, that he was seen driving his car from that direction almost daily, that on at least two occasions very shortly after this occurrence he had stated to the officers that it was his home, that he claimed the money as belonging to him. This is certainly sufficient to send the case to the jury on the possession charge. Defendant appears to concede this in his brief, but argues that it is not sufficient to send the case to the jury on the case of possession with intent to distribute.

With respect to the charge of possession with intent to distribute and manufacturing, we are compelled to reach a different conclusion. There is no evidence that defendant was at the house at the time of

the search, nor was there any evidence that he had been in the house at any specific time just prior thereto. The evidence is clear that he said, after the search, that he lived there; but we find no evidence in the record that he had been there at any specific time or times prior to the search. We think this charge of manufacturing is controlled by State v. Baxter, 21 N. C. App. 81, 83, 203 S.E. 2d 93 (1974), where Judge Campbell said:

> "The only evidence of manufacturing, therefore, is the fact that the marijuana was packaged, by whom, or for what purpose. The defendant was not at home at the time and it was not established that he had been home in over a week. The sport coat containing marijuana was not established as being the defendant's nor was any of the marijuana or other items found established to have been defendant's, other than the State failed to prove a sufficient nexus between the defendant, the marijuana, and other items to establish that (1) marijuana was being manufactured and (2) that it was being done by the defendant."

Here we have obvious items used in the cutting of heroin, a small amount of packaged heroin, a large number of glassine bags, but no evidence that any of it belonged to defendant. The coat from which money was taken were never identified although he did claim the money. Defendant was not at home when the search was made and there

was no evidence as to when he had last been there. Even if there were a presumption with respect to possession of heroin for distribution, and there is not, it would not aid the State in a case of manufacturing in order to prove intent to distribute. G. S. 90-87(15) defines manufacturing in such a way that it can only mean manufacture with the intent to distribute as opposed to manufacturing for one's own use. State v. Baxter, supra. For the reasons stated, we are of the opinion that the court erred in submitting the charge of manufacturing to the jury.

As to the charge of possession-affirmed.

As to the charges of possession with intent to distribute and manufacturing-reversed and judgments arrested.

Judges CAMPBELL and VAUGHN concur.

APPENDIX II

NO. 125PC FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1974

* * * * * * * * * * *

STATE OF NORTH CAROLINA	
v	ORDER DENYING PETITION FOR WRIT OF CERTIORARI
LEVI WHITTED	

* * * * * * * * * * *

This cause came on to be considered upon the petition of the defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals; upon consideration whereof, it is adjudged by the Court here, that the petition be denied and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

Witness my hand and the seal of the Supreme Court, this ____ day of _____,

1974.

Clerk of the Supreme Court
of North Carolina

cc: Taylor & Upperman, Attorney

Walter E. Ricks, III, Assistant Attorney General

Anthony Brannon, District Attorney

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STATUTES CITED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No.

LEVI WHITTED,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

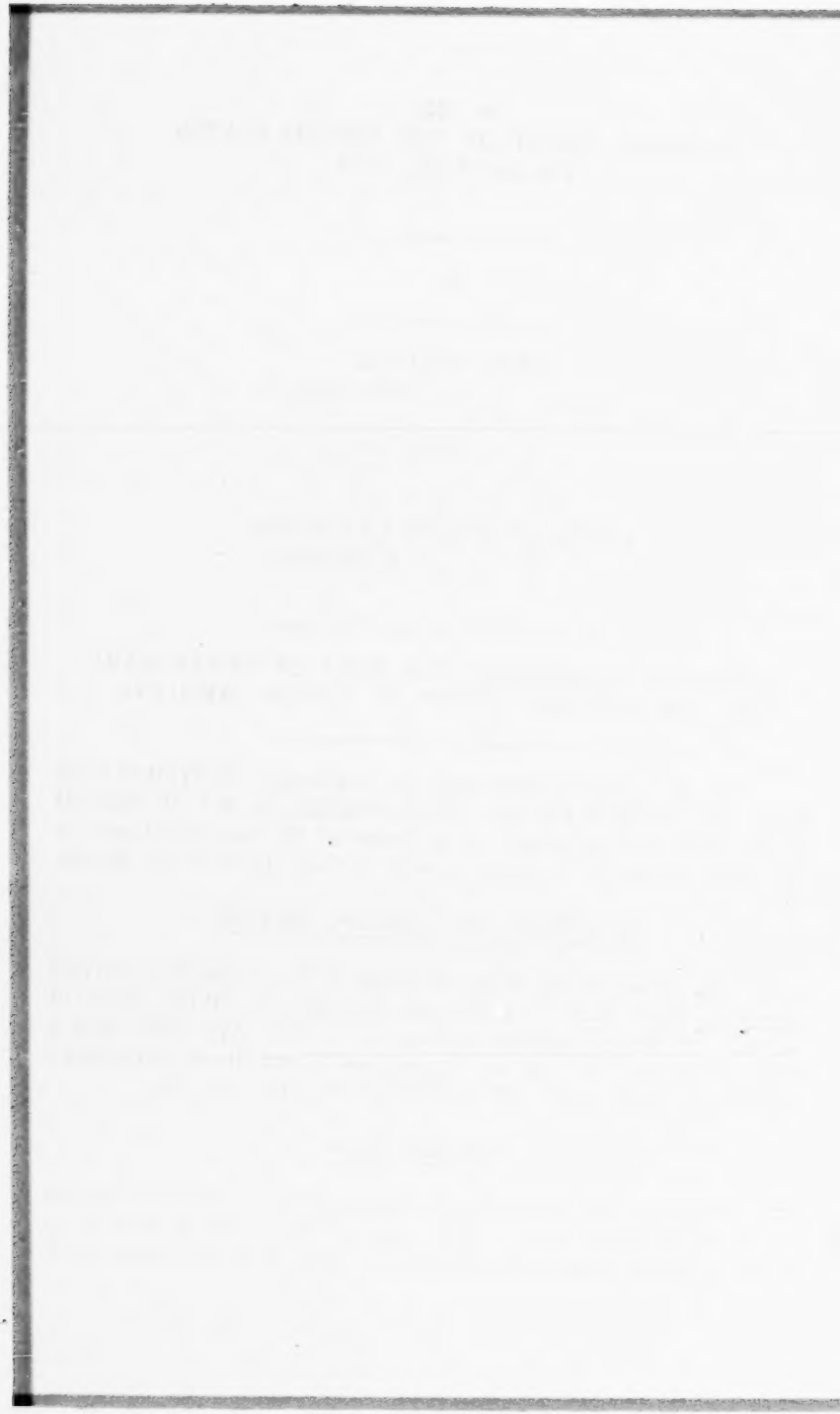
The Respondent prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of an Order of the Supreme Court of the State of North Carolina entered on July 1, 1974, be denied.

CITATIONS TO OPINIONS BELOW

The Order of the Supreme Court of North Carolina denying certiorari dated July 1, 1974, and the opinion of the Court of Appeals of North Carolina reported at 21 N.C. App. 649, filed 5 June 1974, are set out in Appendices I and II of Petitioner's PETITION FOR WRIT OF CERTIORARI (pp. 20, 28).

JURISDICTION

This case was decided by the Supreme Court of North Carolina by an order dated July 1, 1974, and by the Court of Appeals of North Carolina, *State v. Levi Whitted*, 21 N.C. App. 649, June 1974.



The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) and further under the Fourth Amendment to the United States Constitution and Sections 19, 20, and 23, Article 1, Constitution of North Carolina. The Respondent contends that there has been no deprivation of rights secured by the Constitution of the United States and that this Court should not assume jurisdiction of this case.

STATEMENT

Defendant-appellant was tried on three separate bills of indictment returned in Durham County Superior Court charging defendant with felonious possession of "...Heroin which is included in Schedule I of the North Carolina Controlled Substances Act", felonious possession with intent to distribute heroin, and felonious manufacture of heroin. (R.pp. 2,3,4). Defendant was tried during the October 8, 1973, Session of Superior Court held in Durham County, the Honorable Edward B. Clark, presiding.

Upon motion of the District Attorney, the three charges against defendant were consolidated for trial. Defendant entered pleas of not guilty to the charges.(R.p.5). The jury returned a verdict of guilty to all three charges and defendant was sentenced to prison terms of five (5) years for possession of heroin, five (5) years for possession of heroin with intent to distribute and not less than four (4) nor more than five (5) years for manufacture of heroin. (R.pp. 5-7). In apt time, defendant gave notice of appeal to the North Carolina Court of Appeals.

The Court of Appeals of North Carolina reversed the convictions and arrested the judgments to the charges of possession with intent to distribute and manufacture of heroin and affirmed defendant's conviction of felonious possession of heroin. Defendant petitioned the North Carolina Supreme Court for Certiorari to review the decision of the Court of Appeals of North Carolina affirming defendant's conviction of possession of heroin and the State petitioned the North Carolina Supreme Court for Certiorari to review the decision of the Court of Appeals of North Carolina reversing and arresting judgments of the defendant's convictions of possession of heroin with intent to distribute and manufacture of heroin. The Supreme Court denied both petitions, the defendant's by order filed July 1, 1974 and the State's by order filed August 30, 1974.

STATEMENT OF FACTS

Sgt. J. C. Fuller of the Durham Police Department, Vice Squad, on March 6, 1973, secured a search warrant authorizing him to search the premises of Levi Whitted, the person of Larry Lee and Larry Lee's vehicle for the controlled substance, heroin. The search warrant was issued upon a finding of probable cause by the issuing magistrate based upon information furnished him by Sgt. Fuller. The sworn affidavit furnished the magistrate read as follows:

> "Sgt. J. C. Fuller, Vice Squad, Durham Police Department, Durham, North Carolina; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Levi Whitted and Larry Lee has the premises of Levi Whitted, the person of Larry Lee and his vehicle, certain property, to wit: Heroin, the possession of which is a crime, to wit: illegal possession of heroin, 3-6-73, Rt. 2, Guess Rd., Durham, N. C. approx. 1/2 mile South of Russell Rd. The property described above is located on the premises of Levi Whitted and the person of Larry Lee and Larry Lee's vehicle described as follows: Rt. 2, Box 275, Guess Rd., Durham, N. C. home of Levi Whitted is a one story brick home with an attic. Located on East side of Guess Rd. front facing West. Larry Lee, bm, dark skin, 6 feet, 180 pounds has afro, age 25. Has 1969 Eldorado, with white over maroone, two door cadillac, N. J. license. License No. STN-471. The facts which establish probable cause for the issuance of a search warrant are as follows: A reliable citizen of the City of Durham, N. C. who has given me information in the past that has led to the arrest and conviction of several people in Durham County Superior Court, dates of conviction being week of 4-24-72, 7-17-72 and 11-20-72, all drug convictions. This informer stated to me on 3-6-73 that on this date he was in the home of Levi Whitted, Rt. 2, Guess Rd., Durham, N. C. in the presence of Larry Lee. At that time he saw within the above address a quantity of heroin in the possession of Larry Lee. This informer has been in the Vice Squad Office on several occasions and has correctly identified heroin and recognizes

heroin when he sees it.

s/ J. C. Fuller
Signature of Affiant

Sworn and subscribed to before me this 6 day of March, 1973
s/ JEWEL PARRISH
Magistrate"

The search warrant read as follows:

"STATE OF NORTH CAROLINA
COUNTY OF DURHAM

In The General Court of Justice, District Court Division

To Any Lawful Official Empowered to Conduct the Search Authorized by this Warrant - -
GREETING:

Whereas information has been furnished me by the affiant named in the affidavit on the reverse hereof, who stated that under oath that Levi Whitted and Larry Lee has property described in said affidavit, related in the manner described in the affidavit with the commission of a crime, also described in the said affidavit, that such property is located as described in the affidavit. And whereas I have examined under oath the affiant and am satisfied that there is probable cause to believe that the named person has such property on the premises of Levi Whitted, the person of Larry Lee & Larry Lee vehicle, described in the aforesaid affidavit, you are commanded to search the premises and person of Larry Lee and Larry Lee's vehicle for the property in question. If this property is found, seize it and keep it subject to court order.

Herein fail not and of this warrant make due return.

Issued this 6 day of March, 1973, at 11:45 o'clock A.M., upon information furnished under oath by the affiant, named below:

s/SGT. J. C. FULLER
Affiant

s/JEWEL PARRISH
Magistrate

Jewel Parrish
Issuing Official

SEARCH WARRANT

Issued: March 6, 1973 at 11:45 A.M.

RETURN

I hereby certify that on March 6, 1973 at 11:45 A.M., this Search Warrant came into my hands, and that on March 6, 1973 at 12:15 P.M., I made search of Rt. 2, Guess Rd, Box 275, Levi's House, as therein commanded. I took into my custody the following: Green Veg. Mat., 3 bags White Powder, Suit Case, 2 Strainers, Spoons, ... , 1 Box Glasine Bags, Measuring Spoons, 116 Pills, $810.00, which is held subject to further court orders.

This 6 day of March, 1973, at 4:30 P.M.

s/ NORMAN McCLENNY
Durham County Police

This executed search warrant was returned to me on March 6, 1973 at 5:00 P.M.

s/W. L. Hilliard
Magistrate

After the issuance of the search warrant, Sgt. Fuller, along with other law enforcement officers, went to the residence of the defendant where the warrant was served on his daughter. (R.23). Upon seaching the house, the officers found various paraphernalia used in the manufacture and distribution of heroin, including a

measuring spoon, a sifter, a single playing card and a quantity of quinine, as well as a quantity of heroin. (R.pp. 37, 42, 43, 67).

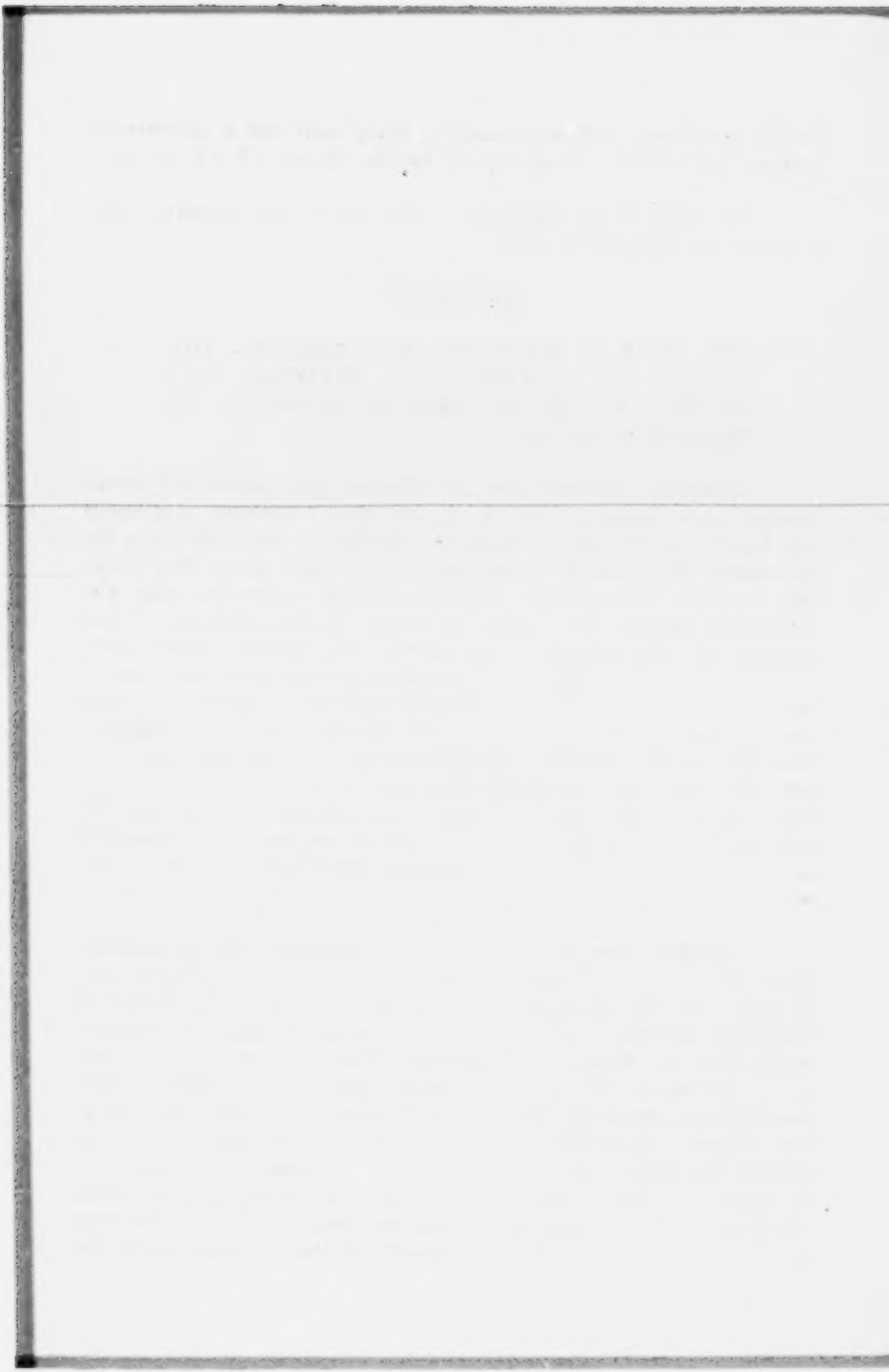
The items found pursuant to the search were admitted into evidence at defendant's trial.

ARGUMENT I

THE SEARCH WARRANT AUTHORIZING THE SEARCH OF DEFENDANT'S PREMISES WAS ISSUED AFTER A PROPER FINDING OF PROBABLE CAUSE.

Appellant contends that the affidavit upon which the search warrant authorizing the search of defendant's premises was based was legally insufficient to support a finding of probable cause for the search. The affidavit, sworn to by Sgt. Fuller, stated that Fuller had received information from a reliable informant that the informant had seen a quantity of heroin on the premises of Levi Whitted in the possession of Larry Lee. Clearly, upon being presented with this information furnished by a reliable, confidential source, a law enforcement officer could rightfully believe that heroin was located on the premises of Levi Whitted. While it perhaps is best that search warrants and affidavits upon which they are based not delve into who is doing what insofar as the location of the search is concerned, the State would submit that the fact that the informant stated to Sgt. Fuller that the heroin was in the possession of Larry Lee does not have a limiting effect on the scope of the search.

Appellant does not argue that the affidavit fails to establish probable cause for a search of the person or vehicle of Larry Lee. In order for the place described in the affidavit to be limited as Petitioner desires, it would appear to the State that the Affidavit would have to contain some wording upon which such a limitation could be leased. No such limitation appears. The affiant, after describing in detail the location of Petitioner's residence as well as the residence itself (including a reference to the attic where the heroin was found), stated he had been informed that "within the above address" heroin was located. There is no indication as to where on Petitioner's premises the heroin was located. This, in the eyes of the State, would authorize a search of the premises where the



heroin had been seen. Such a search of the premises would, of course, include the attic. *U.S. v. Meyer*, 417 F.2d. 1020 (1969).

The State does not contend that the Affidavit upon which the search warrant in this case was issued, without changing a single fact contained therein, could not have been better written. In light of this Court's decision in *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d. 684, 85 S.Ct. 741 (1965), however, to the effect that an affidavit for a search warrant should be interpreted in a commonsense and realistic fashion, the State submits that the Affidavit upon which the search warrant was based contained ample evidence for a proper finding of probable cause.

II

THE SEARCH WARRANT UNDER WHOSE AUTHORITY DEFENDANTS PROPERTY WAS SEARCHED PROPERLY AUTHORIZED THE SEARCH OF DEFENDANT'S PREMISES.

The search warrant under whose authority Sgt. Fuller and other law enforcement officers searched defendant's premises was based upon an affidavit properly establishing probable cause for the issuance of the warrant. The search warrant stated that the property the subject of the search was located as described in the affidavit and commanded a search of the premises. The Affidavit most clearly describes defendant's premises as follows:

> "Rt. 2, Box 275, Guess Rd., Durham, N. C. home of Levi Whitted is a one story brick home with an attic. Located on Eastside of Guess Rd. front facing West."

Since the search warrant in this instance made direct reference to the affidavit, and since, under North Carolina law the affidavit establishing probable cause is required to be attached to the search warrant (N.C.G.S. 15-26), the State respectfully submits that there is no question but that the warrant properly commanded a search of defendant's premises.

In support of this contention, see *State v. Vestal*, 278 N.C.

561, 180 S.E. 2d 881, *State v. Foye*, 14 N.C. App. 200, 188 S.E. 2d 67.

CONCLUSION

For reasons stated, the Respondent contends that the judgment of the trial court, as affirmed by the North Carolina Court of Appeals, in no way violated the Constitution of the United States. The Respondent respectfully submits that this Court should, on that basis, deny the Petition for Writ of Certiorari to the Supre Court of North Carolina.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General of
North Carolina

H. A. COLE, JR.
Assistant Attorney General

Walter E. Ricks

WALTER E. RICKS, III
Assistant Attorney General

Counsel for the State of
North Carolina, Respondent

Department of Justice
Highway Building
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA upon the Attorney for the Petitioner, Levi Whitted, by placing copies of said RESPONSE in the United States Post Office at Raleigh, North Carolina, with postage prepaid and with the same addressed to:

Herman L. Taylor, Esquire
Taylor and Upperman
Post Office Box 20383
Greensboro, N. C. 27420

This the 20th day of December, 1974.

Walter E. Ricks, II
Assistant Attorney General
of North Carolina